STATE OF MICHIGAN

COURT OF APPEALS

DAWN MARIE BETTS,

Plaintiff-Appellant,

and

DOUGLAS BETTS,

Plaintiff,

v

REBECCA LYNN FLETCHER,

Defendant-Appellee.

UNPUBLISHED
June 27, 2006

No. 266613
Washtenaw Circuit Court
LC No. 04-241-NI

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right an order granting defendant partial summary disposition as well as the stipulation and order dismissing her loss of consortium claim. This case arose when defendant, while intoxicated, drove into plaintiff's car while plaintiff was stopped at a stop sign. We affirm.

According to plaintiff, she was stopped at a stop sign when she looked in her rearview mirror and saw defendant's car approaching hers; she could tell defendant was not going to stop. Douglas Betts testified that the speed limit where they were located was forty-five miles an hour. He heard Dawn gasp and felt a violent impact; "the car actually [came] up and then [came] back down," both seats were broken, and the car was pushed to the middle of the intersection. According to Doug, defendant attempted to drive around their car and looked like she planned to drive off, but a witness to the accident flagged her to the side of the road. Both testified that they were dazed afterward but were able to leave the car on their own accord. After they left their car, both testified that defendant staggered toward them with paperwork. According to Doug,

[1] Douglas Betts was dismissed from the action by stipulation and order June 27, 2005. Therefore, any reference to plaintiff in the singular refers to Dawn Betts.

defendant tried to give them insurance papers because she said she wanted to leave. He said defendant then returned to her car and tried to leave again; however, the man who stopped her before had taken her keys. The police arrived and called an ambulance.

According to Doug, when defendant found out the police were taking her to jail, she "wigged out," kicking the windows of the police car. Plaintiff was taken to the hospital by ambulance because of pain in her back and neck. Doug was taken to the hospital by ambulance because of pain in his shoulder, neck, and hip. Plaintiff and her husband initially filed a complaint against defendant and defendant's insurance company. After the claims were severed, plaintiff and her husband filed a claim against defendant. Count IV of the first amended complaint alleged negligence, gross negligence, and intentional battery against defendant. After several orders granting summary disposition, plaintiff's suit was eventually dismissed.

Plaintiff first argues that the grant of summary disposition was error because she raised a genuine issue of material fact with circumstantial evidence regarding defendant's intent to injure, and summary disposition is improper when intent or credibility is at issue. We disagree.

A trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), is reviewed de novo in a light most favorable to the non-moving party to determine whether a genuine issue of material fact existed that would preclude granting judgment as a matter of law to the moving party. *Morales v Auto-Owners Ins Co,* 458 Mich 288, 294; 582 NW2d 776 (1998). With few limited exceptions, the no-fault act abolished tort liability for injuries caused by the operation of a vehicle. *American Alternative Ins Co v York*, 470 Mich 28, 30; 679 NW2d 306 (2004). One of these exceptions is MCL 500.3135(3)(a), which provides for liability for intentionally caused harm to persons or property. In analyzing a claim brought under MCL 500.3135(3)(a), a court may only "review whether the defendant intended to cause the harm that resulted." *American Alternative Ins Co, supra* at 32.

Although summary disposition is rarely suitable in cases that involve issues of credibility, intent, or state of mind, it may be granted when a party fails to present evidence establishing a genuine issue in this regard. *In re Handelsman,* 266 Mich App 433, 437-439; 702 NW2d 641 (2005). Plaintiff's evidence consisted of defendant's probation record and an incident report regarding events that occurred at the jail after defendant was arrested. The evidence indicated defendant was uncooperative after being taken to jail; she smeared her fingerprint card, kicked a prisoner, attempted to kick an officer in the groin, bit another officer in the hand, spit in the faces of two other officers, and had to be restrained. Plaintiff argued that this intent to injure after the accident, along with defendant's failure to brake immediately before the accident, was circumstantial evidence that defendant intended to injure plaintiff by driving into her stopped car.

> Intent "need not be proven by direct evidence, but can be inferred from the totality of the circumstances." [*United States v Cello-Foil Products, Inc,* 100 F3d 1227, 1231 (CA 6, 1996).] "Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Id.* at 1233 (quoting *Washington v Davis,* 426 US 229, 253; 96 S Ct 2040; 48 L Ed 2d 597 [1976]). [*Cipri v Bellingham Foods, Inc,* 235 Mich App 1, 12; 596 NW2d 620 (1999).]

However, directly after the accident occurred and before police arrived, defendant exhibited no signs of assaultive intent. Douglas testified that when they left their car, defendant approached them with insurance papers; she only came within ten or twelve feet of them before she returned to her car and attempted to leave. His version of events was confirmed by plaintiff. Moreover, there was no evidence that defendant attacked the witness who flagged her down when she tried to leave and took her keys. Therefore, the immediately surrounding circumstances did not support plaintiff's claim that defendant was attacking anyone who came within her reach. Notably, all evidence presented by plaintiff indicated that defendant's assaultive acts on others occurred at jail, away from the scene of the incident, and after circumstances that belied defendant's intent to injure.

Although defendant may have been intoxicated at the time of the incident, our Supreme Court has found that intoxication alone was insufficient to demonstrate that a failure to stop at a stop sign and a subsequent collision constituted intentional conduct within the purview of MCL 500.3135(3)(a). *American Alternative Ins Co, supra* at 29, 32-33. In doing so, it cited with approval the test for intent as stated in *Hicks v Vaught*, 162 Mich App 438, 440; 413 NW2d 28 (1987). *Id.* at 32 n 2. This Court in *Hicks, supra*, stated that the actor must "intend to cause harm to a person or property and not merely . . . intend to do the act which causes the harm." *Hicks, supra* at 440. While defendant may have intended to drive while intoxicated, plaintiff failed to present any evidence that defendant intentionally drove into plaintiff's car with the intent to injure plaintiff. *Id.* Hence, because plaintiff failed to present evidence establishing a genuine issue with respect to intent, the court properly granted summary disposition. *In re Handelsman, supra* at 437-439.

Plaintiff next argues that the court erred by granting summary disposition on her intentional battery claim when discovery was not complete with respect to defendant's intent. Correspondingly, plaintiff argues the court erred by arbitrarily halting discovery without compelling production of the portion of the probation records containing defendant's description of the offense. We disagree.

A trial court's decision on a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). Its decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), is reviewed de novo in a light most favorable to the non-moving party to determine whether a genuine issue of material fact existed that would preclude granting judgment as a matter of law to the moving party. *Morales, supra* at 294. Summary disposition generally may not be granted before discovery regarding a disputed issue is complete. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). Plaintiff moved to compel production of defendant's probation records to determine whether there was relevant evidence with respect to defendant's intent. A party may obtain discovery with respect to any matter relevant to a lawsuit as long as the matter is not privileged. *Cabrera, supra* at 407, citing MCR 2.302(B)(1).

The court told plaintiff it would consider having defendant sign a release authorizing the probation department to turn over the records if plaintiff could provide a memorandum citing

legal authority for turning over the records in civil litigation.[2] Probation records are protected by an evidentiary privilege from public disclosure. *Howe v Detroit Free Press, Inc*, 440 Mich 203, 212-213; 487 NW2d 374 (1992),[3] citing MCL 791.229.[4] However, a party holding a privilege may waive the privilege by conduct that would make it unfair to assert the privilege. *Id.* at 214. The court later conducted an in camera inspection of the probation records to determine whether they contained relevant information. To the extent plaintiff argues that the court erred by conducting an in camera inspection, we note that plaintiff has waived this issue. Plaintiff's counsel suggested that the court review the information in camera. A party may not claim as error on appeal that to which he agreed at trial. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

After reviewing the probation department records, including any statements by defendant that were included in her presentence investigation reports, the trial court found that the records did "not contain information that could lead to the discovery of admissible evidence to support plaintiff's claim of intentional tort." After reviewing defendant's statement, we agree that there was nothing in defendant's version of events indicating an intent to injure. Hence, the statement was not relevant to the lawsuit, and the trial court did not abuse its discretion by denying plaintiff's motion to compel. *Cabrera, supra* at 406-407. Moreover, because discovery of the statement would not have provided factual support for plaintiff's claim, summary disposition was appropriate. *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 266 Mich App 297, 306; 701 NW2d 756 (2005).

Plaintiff next argues that defendant's motion for summary disposition was not supported by admissible evidence because the medical records were not authenticated; hence, the burden never shifted to plaintiff to show that there was a genuine issue of material fact for trial, and the court improperly granted defendant summary disposition. We disagree.

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[2] Plaintiff also appears to argue the court erred by sua sponte raising the privilege with respect to the probation reports when defendant failed to assert the privilege. However, the issue arose in connection with plaintiff's motion to compel discovery. MCR 2.313(A)(3) provides, "If the court denies the motion [to compel discovery] in whole or in part, it may enter a protective order that it could have entered on motion made under MCR 2.302(C)." MCR 2.302(C) provides the procedure to move for a protective order. Hence, the court had discretion to enter the protective order without defendant moving for a protective order.

[3] Plaintiff cites *Howe, supra,* for the proposition that a privilege cannot be used as both a sword and a shield. *Howe* involved a defamation lawsuit in which the defendants sought the plaintiff's probation record to prove their defense of truth. *Howe, supra* at 207. Thus, the plaintiff started the suit, then attempted to deprive defendants of evidence essential to their defense by asserting his privilege. Not only were the facts in *Howe* distinguishable from the facts in the instant case, but the Supreme Court limited its holding to the particular facts and circumstances of the case. *Id.* at 223.

[4] MCL 791.229 was amended by 1998 PA 512; however, a comparison of the statute as stated in *Howe, supra* at 211, and the current version of the statute indicates the amendment did not affect the applicability of *Howe* to the current statute.

To sustain an action for noneconomic tort damages under the no-fault act, a plaintiff must demonstrate a serious impairment of an important body function by showing that it (a) is objectively manifested, and (b) affects the plaintiff's general ability to lead a normal life. *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004). The action may be decided as a matter of law when either (a) there is no factual dispute about the nature and extent of the person's injuries, or (b) the factual dispute about the nature and extent of the injuries is immaterial to whether a serious impairment of body function occurred. *McDanield v Hemker*, 268 Mich App 269, 273-274; 707 NW2d 211 (2005). In the instant case, the trial court indicated that the factual dispute with respect to the nature and extent of plaintiff's injuries was immaterial when it directed plaintiff to address not the nature of the injuries, but plaintiff's ability to lead her normal life.

Plaintiff is correct when she argues that a motion for summary disposition must be supported by admissible evidence. MCR 2.116(G)(6). Defendant did, however, provide admissible evidence in the form of plaintiff's deposition testimony. MCR 2.116(G)(6). Plaintiff testified that she only missed two months of work before returning full-time as a fitness instructor. Before the accident, she would run six miles and perform yoga three hours a day; after the accident, she could only run three or four miles and perform one hour of yoga a day. "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner, supra* at 137. Plaintiff said she was still able to cook, clean, drive, mow the lawn, shop for groceries, and attend her son's sporting events. This indicated plaintiff was still generally able to lead her normal life.

Plaintiff could not recall anything she specifically could not do, but said there were many things, such as yard work or gardening, that she would not do because she was afraid it would hurt. Nevertheless, self-imposed restrictions cannot establish the extent of residual impairment. *Kreiner, supra* at 133 n 17. Therefore, defendant presented sufficient evidence to demonstrate that any impairment of a body function did not affect the overall course of plaintiff's life, and the burden was shifted to plaintiff to demonstrate with admissible evidence a genuine issue of material fact otherwise. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

Counsel for plaintiff argued that plaintiff had chronic pain and difficulty sleeping, and plaintiff was still waiting to receive from defendant medical documentation of these conditions. The medical evidence plaintiff provided indicated that plaintiff had an extensive history of anxiety, panic-like symptoms, and sleep disorders, but the symptoms had worsened since the 2002 accident.[5] Again, a negative impact on a particular aspect of one's life does not by itself meet the tort threshold if one is generally able to lead one's normal life. *Kreiner, supra* at 137. Moreover, plaintiff does not argue on appeal that she established a genuine issue of fact whether her ability to generally lead her normal life was affected. Given plaintiff's failure to raise an

[5] Although plaintiff's argument on appeal is that her medical records were unauthenticated, plaintiff supported her summary disposition argument with her medical records.

issue with respect to whether her general ability to lead her normal life was affected, we find that the court properly granted defendant summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens